No. 13,074

IN THE

United States Court of Appeals

For the Ninth Circuit

THE COMMANDER DOOR, INC. (a corporation),
Appellant,

vs.

DUNSMUIR LUMBER CO. (a corporation),
Appellee.

APPELLEE'S REPLY BRIEF.

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STATEMENT OF THE CASE.

This is an appeal from a judgment in favor of the appellee entered pursuant to a motion to dismiss. (Rule 41 b, Rules of Civ. Proc.) The motion was made at the conclusion of the appellant's evidence. The action is founded on a written contract and the facts are simple.

The appellant's complaint alleged that it had ordered certain lumber from the appellee and that by reason of failure in delivery the appellant suffered damages in the sum of $21,400. (C.T. pp. 3-5.)

At the trial the appellant relied on a written agreement dated March 3, 1950. (R.T. pp. 24-25.) This was the same document referred to in the complaint.

The order in essence provided as follows: that the appellant ordered a certain quality of lumber from the appellee to be shipped pursuant to a shipping schedule and at fixed prices. The order was dated March 3 and the shipping schedule was periodic extending to November 15th. (R.T. pp. 24-25.)

The order was prepared by the appellant and accepted by the appellee. The order contains two pages and on each page the right of cancellation and termination at any time was reserved. The language of the instrument is as follows:

> "It is understood and agreed that any unshipped portion of this contract may be cancelled at any time without cost to us." (R.T. pp. 24-25.)

The signature of both parties is affixed to each page of the order and below the cancellation clause.

During the course of the lumber season problems arose respecting the contract. The parties had difficulty over payments and other matters and the appellee's source of supply ran short. The appellee sought to have the appellant obtain lumber temporarily from other sources. Such negotiations failed.

The appellee then exercised its right to terminate the contract as to the unshipped portions. Testimony to such effect was given by Mr. Howell, president of the appellant. (R.T. pp. 59, 60.)

At the trial (as in its pleadings) the appellant repeatedly declared that its action was on the contract of March 3. At the opening of the trial, Mr. Andersen, attorney for the appellant, stated (R.T. pp. 22-23):

"Mr. Andersen. *The issues are very simple. Our cause of action is based upon a contract dated March 3rd, a copy of which I am sure counsel for the defendant has (exhibiting to counsel).*"

And later Mr. Andersen stated (R. T. p. 27):

"The Court. What is the contention here, that this (2) contract is *partially in writing and partially verbal?*

"Mr. Andersen. *No;* as I understand the issue from the plaintiff's standpoint, it is simply this, your Honor: my client, the Commander Door Company back east ordered certain cut lumber from the defendant *under an order which is now Plaintiff's Exhibit Number 1.* The order was accepted by the defendants.

The Court. *Your position is that the contract is complete in and of itself?*

Mr. Andersen. *Complete in and of itself.*"

The appellant's evidence was all directed to the March 3 contract. After the motion to dismiss was made the appellant requested leave to reopen its case. (R.T. p. 62.) It then offered certain letters written *prior* to the date of the order. Three letters dated subsequent to March 3 were also offered. Objection to the evidence was made on the ground that the proposed evidence violated the parol evidence rule and in any event was immaterial. (R.T. p. 86.) Such objection was sustained. (R.T. p. 86.)

For clarity we will summarize the contents of the offered letters. The first one is dated September 30,

1949 (prior to the contract) and is simply advice by a lumber broker connected with the appellee (Fred Bennett) that the appellee manufactures certain lumber of a type used by the appellant. (R.T. pp. 66-67.)

The next letter offered was dated February 10, 1950 (*prior* to the order) from Bennett to the appellant. This simply emphasizes that the appellee must have the appellant's order if the parties are to do business. (R.T. p. 69.)

The next letter was dated February 23, 1950 (prior to the contract) from Bennett to the appellant. This letter simply discusses the price of the lumber that is to be bought. (R.T. p. 73.)

The next letter is dated July 25, 1950 (*post* contract) and is from the appellant to Bennett. In this the appellant states:

> "* * * our order with you and the Dunsmuir Lumber Company was a firm order and was not placed with you with the understanding that the prices were to be made at the time of shipment". (R.T. p. 74.)

The appellant also offered an order of February 17, 1950 (prior to contract) which was not executed by the appellee.

The next letter offered was dated February 20, 1950 (prior to contract) and refers to the rejected order of February 17. It contains a general discussion of the prices at which appellee will sell lumber and states that the appellee will not submit to fluctuating prices but that any price schedule must be "firm". (R.T. pp. 79, 81-83.)

The appellant also offered a letter dated July 27, 1950 (post contract) which refers generally to prices and that they were to be "firm" in the order.

The offered evidence added nothing to the contract and was clearly objectionable. The contract itself provided that the prices were to be firm". It states (R.T. p. 25):

"The prices on this order are firm."

Thus the letters do not add or detract from the contract. The prices were not subject to adjustment by either party; but either party could cancel the contract at any time as to any unshipped portion thereof.

The trial Court held that the contract was clear on its face; was not ambiguous; that the provisions as to firm prices and right of cancellation were clearly reconcilable; that thus parol evidence was not admissible. (R.T. pp. 86-87.)

ARGUMENT.

I.

THE MARCH 3 CONTRACT WAS CLEAR AND UNAMBIGUOUS AND PAROL EVIDENCE PERTAINING THERETO WAS THUS INADMISSIBLE.

As stated, the March 3 contract provided that as to price it was firm but that it was subject to cancellation as to unshipped portions.

The contract was not ambiguous and the two provisions are not in conflict. As long as the contract remained in effect the prices were to be firm. This

was important because it prevented price changes while shipments were in transit. But the appellant in its order desired to have an escape provision. So it provided that the contract could be cancelled without liability at any time as to any unshipped portions of the contract.

The cancellation clause is not ambiguous. It is not repugnant to the price clause. The clauses are consistent and thus evidence of negotiations or other parol evidence is inadmissible. The law is clear in this respect.

Section 1625 of the California Civil Code provides:

> "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

And Section 1638 of the Civil Code provides:

> "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

The prevailing and uniform rule is stated in 20 *Am. Jur.* p. 958 as follows:

> "It is a general principle that where the parties to a contract have deliberately put their engagement in writing in such terms as import a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties and the extent and manner of their undertaking have been reduced to writing; in

other words, the parol agreement is merged in the written agreement and all parol testimony of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent."

The above rule was recently applied by the California Court in the case of *Masciotra v. Harlow* (July 1951) 105 A.C.A. 454, where the Court held at page 460:

"Much of the evidence introduced was of negotiations which took place prior to the execution of the lease. Since the agreement of the parties has been reduced to writing the written document supersedes all the oral negotiations and there can be no evidence of the terms of the agreement other than the contents of the writing."

See also,

Parker v. Meneley (August 1951) 106 A.C.A. 438.

(The Pacific Reporter citations of the above cases are not presently available.)

The California rule respecting parol evidence is aptly summarized in 6 *Cal. Jur.* 261-262, as follows:

"As a general rule, preliminary negotiations leading up to a contract, and not embodied in it, constitute no part of the final binding contract, and its legal effect cannot be changed by reference to them. When the terms of an agreement have been reduced to writing, no evidence of other negotiations or terms is admissible. It must be presumed, in the absence of fraud, acci-

> dent or mistake, that the entire negotiations of the parties are included in the contract as executed. The written contract must control as to all the terms expressed in it; and if there is any difference between it and the oral agreement, the document must be referred to in order to determine the rights of the parties."

In *Browne v. Fletcher Aviation Corp.*, 67 C.A. (2d) 855, 155 P. (2d) 896, the Court held on this issue (p. 860):

> "Whatever the preliminary proposals may have been, they were of course merged in the written agreement and could not be given effect to add to, alter or modify its plain terms."

The cases are legion on this issue but the law is so fundamental extended citation is useless. It is quite clear that all evidence offered by the appellant of the preliminary negotiations of these parties is objectionable. The trial Court therefore properly rejected it.

The plain contract between the parties is that it is subject to cancellation at any time as to any unshipped lumber. The appellee simply exercised its contractual right and terminated the contract.

II.

THE PROVISION RESPECTING CANCELLATION WAS RECIPROCAL AS TO THE PARTIES; IN ANY EVENT THE LAW IMPOSES RECIPROCITY IN ORDER TO GIVE MUTUALITY TO THE CONTRACT.

The provision in issue has been quoted above. It provides that the contract can be cancelled at any time as to any unshipped lumber without cost to us. The appellant has made the contention that such clause is for its benefit only. Such position is contrary to the express language since it refers to both parties; and it is over the signature of both parties. Thus the word "us" must refer to both signing parties.

In addition, unless the provision is mutual and reciprocal the purported contract is null and void because of the absence of mutuality. The California law is quite clear on this issue.

The rule is thus stated in 4 *Cal. Jur.* Ten Year Supp. 96, as follows:

> "A contract which reserves in either party an option to deliver or to accept personal property, or which contracts for future delivery thereof, the quantity of which delivery is dependent upon the will, wish, want or desire of the other party, is void for lack of consideration and mutuality."

A leading case is that of *Fabbro v. Dardi & Co.,* 93 C.A. (2d) 247, 209 P. (2d) 91, where the Court held (p. 251):

> "In the case of an instalment contract, like this one, the contract if subject to cancellation by one

party at any time is binding only to the extent to which it has been performed and is revocable by either party as to the portion not yet performed. 'The law is well settled that, where a contract for the future delivery of personal property confers upon either party an arbitrary right of cancellation prior to delivery, it is lacking in mutuality and will be held binding upon the parties only to the extent that it has been performed.' "

The Supreme Court of California applied this principle in *Naify v. Pacific Indemnity Co.*, 11 C. (2d) 5, 76 P. (2d) 663, where it stated (p. 11):

"Parties are, within reason, free to contract as they please, and to make bargains which place one party at a disadvantage; but a contract must have mutuality of obligation, and an agreement which permits one party to withdraw at his pleasure is void."

And in *California Refining Co. v. Producers Refining Corporation*, 25 C. A. (2d) 104, 76 P. (2d) 553, the Court held (pp. 107-108):

"It is uniformly held that a contract which reserves in either party an option to deliver or to accept personal property, or which contracts for future delivery of personal property, the quantity of which delivery is dependent upon the will, wish, want or desire of the other party, is void for lack of consideration and mutuality."

See to the same effect:

County of Alameda v. Ross, 32 C.A. (2d) 135, 89 P. (2d) 460;

Shortell v. Evans-Ferguson Corp., 98 Cal. App. 650, 277 Pac. 519;

Chas. Brown & Sons v. White Lunch Co., 92 Cal. App. 457, 268 Pac. 490.

It is patent therefore that the provision must be construed to be for the benefit of both parties to the contract. If it be for the benefit of the appellant alone the contract is null and void and not binding on anyone except to the extent that it has been performed. Thus the appellee under either theory had an absolute right to cancel the contract as to the unfilled portion thereof.

III.

THERE WERE NO LETTERS OR CONDUCT MODIFYING THE CONTRACT OF MARCH 3.

Appellant somewhat vaguely asserts that the acts and conduct of the parties modified the agreement of March 3. Such contention is rather ill-taken when we consider the appellant's statement at the outset of the trial (R.T. p. 27):

> "The Court. What is the contention here, that this (2) contract is *partially in writing and partially verbal?*
>
> Mr. Andersen. *No;* as I understand the issue from the plaintiff's standpoint, it is simply this, your Honor: my client, the Commander Door Company back east ordered certain cut lumber from the defendant *under an order which is now Plaintiff's Exhibit Number 1.* The order was accepted by the defendants.

The Court. *Your position is that the contract is complete in and of itself?*

Mr. Andersen. *Complete in and of itself.*"

And there was no conduct or acts that modified the contract. Acts could not modify a written agreement because an agreement can only be modified by a writing or an executed parol agreement. (Cal. Civil Code, Sec. 1698.)

And there was no written modification. As stated on page 13 of the appellant's brief the parties were in conflict at times over prices. And the correspondence that the appellant points to concerns such argument over price only. It does not purport to modify the provision of the contract respecting cancellation.

The two items of correspondence relied on by the appellant are Exhibits 11 and 14 for identification.

Exhibit 11, dated July 25, 1950, was written by the appellant to Bennett and clearly refers to price clause and not to the cancellation provision of the agreement. It states (R.T. p. 74):

> "This will acknowledge receipt of your letter of the 21st and to advise that our order with you and Dunsmuir Lumber Company was a firm order and was not placed with you with the *understanding that the prices were to be made at time of shipment.*"

The entire letter, consisting of the above and three more paragraphs, relates to price only. There is no intent to modify the agreement whatever.

And the reply of Bennett is quite clear that the contract was not being modified. Bennett stated (R.T. 84):

> "With reference to this being a firm order. My discussions with the mill and subsequent representations to your were to that effect. *However, your initial order of February 17th stated: 'The price quoted is firm. However, when general market conditions are lower, prices are to be adjusted.' This order was not acceptable and was returned. I do not have a copy of the present order in my office.* As stated in our telephone conversation, normal increases were to have been absorbed and the mill has done so."

Quite clearly this letter has reference to prices. And Bennett stated that it referred to the original order (of Feb. 17) and that he did not know what was in the final order and did not have a copy of it. (Bennett was a lumber broker with offices in Portland, Oregon; the appellee's offices were in Dunsmuir, California.)

Obviously, there was no intent at any time to modify the March 3 contract. As the appellant stated, it was "complete in and of itself".

At no time did anyone offer to change or alter the orginal contract. The parties were in dispute because of certain price increases and the appellant insisted that the agreement was firm as to prices. The contract so provided and the appellant would not yield to arguments that an adjustment should be made. Under such circumstances the appellee elected to cancel the *entire* contract and did so.

The appellant sought to have the contract interpreted to bind the appellee firmly as to prices and then have the reservation of cancellation for its benefit only.

The law however does not permit this. The cancellation provision is either for the appellee's benefit or the entire agreement is void.

There is no question but that conduct can be used to interpret a contract where the meaning is doubtful. But here there is no conduct indicating an intent on the part of either party to write out the cancellation clause. Their agreements over price had nothing to do with the clause; when adjustments could not be obtained the appellee simply cancelled.

The only time that conduct is important is when the meaning of the words is doubtful. The words here are clear and do not require extrinsic evidence. The rule is clearly to this effect and has been succinctly declared in 6 *Cal. Jur.* 304:

> "The intention of the parties is to be ascertained from the writing alone, if possible, and not from the subsequent actions of one of them. However, it is well recognized that the terms of a contract may be manifested by conduct, when not stated in words. And *where the meaning is doubtful,* the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention."

And in 4 *Cal. Jur. Ten Year Supp.* 134, it is stated:

> "It is only *under some circumstances* that the practical construction placed on a contract by the

parties furnishes controlling evidence of what they intended by its terms. In construing acts or expressions as constituting interpretation by the parties of a written contract at variance with the ordinary import of its terms, *it is a cardinal rule that it ought to appear with reasonable certainty that they were acts of both parties, done with knowledge, and in view of a purpose at least consistent with that to which they are later sought to be applied. Such acts must be direct, positive and deliberate and must show that the acts so done were done in an attempted compliance with the terms of the contract or agreement.*"

The appellee demonstrated its understanding of the contract when it cancelled it.

Here the argument was over price. At no time did the appellant contend that the appellee could not cancel the contract. There are no words in either of the letters referred to by the appellant which even intimate this. And certainly Bennett could not write a provision out of the contract which was not referred to specifically and when he did not even have a copy of the contract. There is no evidence that Bennett ever saw the agreement of March 3. The agreements were signed by Mr. Rygel, the president of appellee.

The general citations mentioned in the appellant's brief refer to contracts containing ambiguities and thus are not in point here. Further, they are cases where the conduct helped in construing doubtful clauses. Here the cancellation clause is not doubtful; and there is no conduct directed to its interpretation.

A case directly in point is *Barnhart Aircraft, Inc. v. Preston,* 212 Cal. 19, 297 Pac. 20. Here the plaintiff contracted to build a brick plant of a certain capacity for the defendant and the defendant agreed to pay therefor when the plaintiff demonstrated the plant had the required capacity. The plant was built but the plaintiff failed to demonstrate its capacity. Defendant refused payment and plaintiff brought suit. The plaintiff claimed that the production failure was caused by the defendant's failure to provide a satisfactory concrete mixer and the plaintiff contended this was the defendant's obligation. The contract provided that the plaintiff would furnish all machinery except a concrete mixer. The plaintiff pleaded as follows (p. 21):

> "Respondent sets forth in its complaint that it was understood and agreed between the parties that appellants were to furnish, provide and install in connection with said brick-making machine a concrete mixer in all respects adequate to provide and capable of providing sufficient concrete in the proper form and mixture to permit said machine to operate in the making of brick continuously and to produce 25,000 brick in ten or less successive hours."

The trial Court permitted parol evidence of contemporaneous and subsequent conduct of the parties to prove the plaintiff's contention. The California Supreme Court held this reversible error because the contract was unambiguous and did not require interpretation. The Court stated (pp. 23-24):

"'"It must be borne in mind that although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet no other words can be added to or substituted for those of the writing. The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language."

'The effect of the evidence received by the court in the instant case was to write into the contract a provision not placed there by the parties, although respondent in its complaint attempted by pleading the legal effect of the contract to incorporate therein such an understanding, but when confronted with the document itself the interpolation becomes obvious. * * *'"

It is settled law that when the language of a contract is clear and unambiguous the conduct of the parties is immaterial since they cannot change the terms of their agreement except in a manner authorized by law. A written agreement can only be altered by another written agreement or by an executed parol agreement.

Hughes v. Pacific Wharf & Storage Co., 188 Cal. 210, 205 Pac. 105;

Coneland Water Co. v. Nickolls, 75 Cal. App. 212, 242 Pac. 518;

Purdy v. Buffum, Inc., 95 Cal. App. 299, 272 Pac. 770.

In the *Hughes* case, *supra*, the California Supreme Court held (p. 217):

> "In the first place, if the contract is definite and certain it is neither *necessary nor proper* to rely upon the conduct of the parties for its construction. Rules of construction are resorted to for the purpose of ascertaining what the contract really was and if that matter is not in doubt, it is unnecessary to rely upon those considerations which obtain where the construction of the contract is in doubt."

In the *Purdy* case *supra* the plaintiff had a contract for wages at $50.00 per week and a commission. Subsequently she signed a memorandum stating her wages were $50.00 per week and no reference was made to the commission. The Court held that as a matter of law the original contract was not modified. (In the instant case the letters referred to the prices being "firm"; so did the contract. This could not annul the cancellation clause.)

In the *Purdy* case the Court held subsequent conduct inadmissible to construe an unambiguous contract. It stated (p. 303):

> "Appellant next contends for the rules that a contract may be explained by reference to the circumstances under which it was made and *that the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention. But these rules are not applicable in construing clear and unambiguous contracts.* They have to do with the contracts in which the intention of the parties cannot be ascertained from the writing alone because the writing is doubtful, uncertain, or ambiguous.

> The intention of the parties is to be ascertained from the writing alone if possible. Surrounding circumstances and subsequent conduct may be invoked to interpret a contract only in cases where upon the face of the contract itself there is doubt, and the evidence is used to dispel that doubt, not by showing that the parties meant something other than what they said, but by showing what they meant by what they said."

In *Briggs v. Marcus-Lesoine, Inc.*, 3 C.A. (2d) 207, 39 P. (2d) 442, the parties were in dispute over the expenditure clause of a contract. The appellant produced a letter *subsequent* to the contract to show the interpretation of the parties. The Court held the letter inadmissible and said (p. 212):

> "Since the language of the letter of April 26th clearly expresses the intent to limit the expenditures authorized to one-third of the cost of advertising done in the 'Tower Magazines', *the letter of November 2nd can avail appellant nothing as evidence of the interpretation placed upon the agreement by the parties. The circumstances surrounding the execution of a contract in writing, and the subsequent conduct of the parties thereto, may be invoked to interpret it only in those cases where upon the face of the writing itself there is doubt.*"

It is thus apparent that the letters subsequent to March 3 avail the appellant nothing. The agreement is clear on its face and thus subsequent conduct is immaterial.

CONCLUSION.

It is clear that the judgment should be affirmed. The March 3 agreement is clear and gives an unequivocal right of cancellation. Such clause is for the benefit of both parties.

The appellee elected to cancel and this foreclosed any right of action for undelivered lumber.

The appellant's offer of proof is immaterial because none of it purported to or in any way suggests that it was intended to alter the March 3 contract. The proof all related to a price discussion and not to the cancellation clause or the duration of the agreement.

And the proof was inadmissible because the contract was clear and certain. The previous discussion establishes that when the contract is unambiguous that neither prior negotiations or subsequent conduct of the parties is admissible. The contract cannot be varied or altered by parol conduct. The trial Court properly rejected the appellant's offer of proof since it was both immaterial and in violation of the parol evidence rule.

Dated, Redding, California,
December 17, 1951.

Respectfully submitted,
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